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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re ANGEL W., a Person Coming Under the Juvenile Court Law.	
DEPARTMENT OF HEALTH & HUMAN SERIVCES, Plaintiff and Respondent, v. LEVETUS B., Defendant and Appellant.	C037895 C037896 (Super. Ct. No. JD212201)

APPEAL from a judgment of the Superior Court of Sacramento County. Natalie S. Lindsey, Juvenile Court Referee. Affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Robert A. Ryan, Jr., County Counsel, and John Soika, Deputy County Counsel, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I, II, III and IV of the Discussion.

In these consolidated appeals, Levetus B., mother of the minor, Angel W., appeals from orders of the juvenile court denying her petition for modification and terminating her parental rights. (Welf. & Inst. Code, §§ 388, 366.26 [further undesignated statutory references are to this code].) In the published part of this opinion, we find the court erred in denying appellant's request to represent herself, but that such error was harmless. In the unpublished portions of this opinion, we reject appellant's remaining claims of error. We affirm the orders of the juvenile court.

FACTS

The Department of Health and Human Services (DHHS) removed the two-year-old minor from appellant's custody in September 1998 based upon allegations of neglect, domestic violence and substance abuse. The court adjudged the minor a dependent child and ordered reunification services, including a psychological evaluation. The evaluation concluded appellant tended to project blame for her problems on others, was unlikely to profit from parenting classes, and would probably have difficulty with independent parenting. Appellant participated in services, completed various programs and consistently visited the minor. During visits, appellant was appropriate and the minor seemed to be happy but did not initiate interaction with appellant and was somewhat reserved. The social worker was concerned about appellant's parenting skills and referred her to the intensive Lekotek parenting program. Although visitation interaction was appropriate, the social worker observed that the minor did not

seem to be strongly attached to appellant. After several sessions with appellant and the minor, the Lekotek provider also expressed her belief that there was a lack of a bond between appellant and the minor despite appellant's positive interaction with the minor. According to the Lekotek provider, the minor's response to appellant ranged from eager interaction to anxiety.

Appellant made enough progress in her reunification plan to begin unsupervised and overnight visitation in November 1999 but, by February 2000, she had relapsed into substance abuse. At the permanency review hearing, the court terminated services, decreased visitation and set a section 366.26 hearing. Prior to the hearing, appellant requested the court appoint substitute counsel and, after a hearing, the court granted the request.

The assessment for the section 366.26 hearing stated appellant had visited the minor consistently twice a week until visitation was suspended and then reduced after appellant's relapse. The reports from the visitation supervisor indicated that in the June 2000 visit, the minor did not want to have anything to do with appellant and would not show affection, respond to appellant's directions or interact with her. The July 2000 visit was calmer but the minor still did not readily move toward, interact with, or show affection to appellant. At the August 2000 visit, the minor was not affectionate at all and did not respond to appellant's babying her.

The section 366.26 hearing was continued for several months while DHHS sought a prospective adoptive home for the minor. During this time, appellant filed a petition for modification

requesting additional reunification services, citing as changed circumstances that she was participating in drug testing, attending Alcoholics Anonymous, had stable housing and continued to visit the minor regularly. Appellant alleged no facts to show the proposed change was in the minor's best interests. At the hearing on the petition, the court found the petition did state a change of circumstances based upon appellant's participation in some services on her own, but it was not in the minor's best interests to reinstate reunification.

In February 2001, DHHS filed an addendum to the assessment for the section 366.26 hearing which stated that a prospective adoptive placement had been found and that the minor began visits in the new home in January 2001. The social worker reiterated his previous conclusion the minor was likely to be adopted and recommended termination of parental rights. The social worker believed, based upon observation of visits between appellant and the minor, that the minor was not attached or bonded to appellant since the minor seemed disinterested in visiting with the mother.

At the section 366.26 hearing, appellant again requested substitute counsel, asserting her current counsel failed to return telephone calls, had misrepresented the facts of the case to her and had failed to make arguments appellant considered important. At the court's request, counsel responded to the allegations explaining her tactical choices in representing appellant and addressing the alleged misrepresentations and lack of communication. The court found appellant had not demonstrated either a breakdown in the attorney-client relationship and

communications to the extent that new counsel was required or that counsel's handling of the case showed bad faith or incompetence.

Appellant then sought unsuccessfully to represent herself. Proceeding with counsel, appellant testified about her visitation and contact with the minor. Focusing upon the most recent visit of February 2001, appellant testified the minor recognized her and appeared happy to see her. In describing the visit, appellant testified: "The visit went well. She [the minor] was very happy to see me. She cried 'Momma, Momma, I love you.' The visit went very well. She did not -- she told me that she didn't want to leave me." The minor's counsel interposed a hearsay objection at this point, which the court sustained. Appellant did not challenge the ruling. The court terminated parental rights and ordered the minor placed for adoption.

DISCUSSION

I

Appellant contends the court abused its discretion in denying her petition for modification because she showed both a change in circumstances and that the proposed order would benefit the minor.

A parent may bring a petition for modification of any order of the juvenile court pursuant to section 388 based on new evidence or a showing of changed circumstances.[1] "The parent

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[1] Section 388 provides in part: "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the *[Continued]*

requesting the change of order has the burden of establishing that the change is justified. [Citation omitted.] The standard of proof is preponderance of the evidence. [Citation omitted.]" (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of a petition to modify is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

The best interests of the child are of paramount consideration when the petition is brought after termination of reunification services. (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.) In assessing the best interests of the child, the juvenile court looks not to the parent's interests in reunification but to the needs of the child for permanence and stability. (*Ibid.*; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

We note at the outset that appellant did not, as required, plead facts showing the proposed change was in the minor's best interests. The court could properly have denied the petition for modification on that ground without holding a hearing. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672-673; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

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court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . . [¶] If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held . . . ."

However, the court did hold a hearing. No new evidence was presented at the hearing. Counsel for appellant merely argued that the proposed change, i.e., reinstatement of reunification, was in the best interests of the minor because the changes appellant had made were beneficial to appellant and visits were beneficial to the minor. Thus, the evidence demonstrated that the proposed change served *appellant's* interest in reunification, but there was no evidence that the proposed change would further the *minor's* interest in stability and security. Under the circumstances, the juvenile court was entitled to deny the petition on the ground that destabilizing the minor at this point was not in her best interests, and appellant had failed to demonstrate otherwise. No abuse of discretion appears.

II

Appellant argues the court abused its discretion in denying her request for substitute counsel prior to the section 366.26 hearing.

In a criminal case, when a defendant makes a request for substitute appointed counsel, the trial court must permit the defendant to explain the reason for the request. (*People v. Marsden* (1970) 2 Cal.3d 118, 123-124.) An exhaustive *Marsden* hearing, however, is not required in a dependency action. It is only necessary that the juvenile court "make *some* inquiry into the nature of the complaints against the attorney." (*In re James S*. (1991) 227 Cal.App.3d 930, 935, fn. 13 [original italics].) A timely request for substitution of counsel need not be granted unless it appears that denial would substantially impair the

parent's right to the assistance of counsel. (*People v. Marsden, supra,* 2 Cal.3d at p. 123; *People v. Turner* (1992) 7 Cal.App.4th 913, 917.)

Here, the juvenile court permitted appellant to present all her complaints about counsel's representation. These complaints primarily centered upon counsel's failure to return appellant's telephone calls. The court also asked counsel to justify her actions. Counsel did so at length, specifically explaining that, while much of the communication with appellant was handled by counsel's staff, counsel had spent a significant period of time with appellant preparing for the contested section 366.26 hearing. The court listened to and observed both appellant and counsel and concluded appellant had not demonstrated that new counsel was required. On this record, the juvenile court did not abuse its discretion in reaching its decision.

III

Appellant contends there was insufficient evidence to support the court's finding that she had failed to establish an exception to the statutory preference for adoption.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence -- that is, evidence which is reasonable, credible and of solid value -- to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.)

"'At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption*. [Citation.]' [Citations.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368, original italics].) The court must find a compelling reason for determining termination would be detrimental. (§ 366.26, subd. (c)(1).)

One of the circumstances under which termination of parental rights would be detrimental to the minor is: "The parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (Subd. (c)(1)(A).) The benefit to the child must promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The parent has the burden of establishing the existence of any circumstances which constitute an exception to termination of parental rights. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373, Evid. Code, § 500.) Even frequent and loving contact is not sufficient to establish this benefit absent a significant positive emotional attachment between parent and child. (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Brian B.* (1991) 2 Cal.App.4th 904, 924.)

The evidence before the court established appellant had maintained regular visitation throughout the dependency. However, the evidence does not establish that the minor had a substantial positive emotional attachment to appellant which would outweigh the benefit to the minor of a secure, stable adoptive home.

Early in the reunification process the social worker had concerns that the minor was not bonded or attached to appellant and, for that reason, referred appellant to the intensive parenting program provided by Lekotek. When the Lekotek program was suspended after appellant's relapse and the accompanying reduction in visitation, the service provider expressed concerns about the quality of the relationship between appellant and the minor. More direct evidence, based upon observations of the parent/child interaction, showed that while appellant made appropriate efforts to engage the minor, the minor's response ranged from eager pleasure to anxiety and, in several visits, total disinterest. At best, the evidence from the reports and

appellant's testimony demonstrates frequent contact that was, perhaps, often loving and positive but also often neutral or negative for the minor, however positive the visits were for appellant. This evidence did not rise to the compelling level necessary for the court to determine that termination of appellant's parental rights would be detrimental to the minor. Substantial evidence supports the juvenile court's orders.

IV

Appellant contends the juvenile court erred in sustaining the minor's counsel's hearsay objection to her testimony about the minor's statements during visits thereby denying her right to confrontation.

Appellant has not preserved this claim for review. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Christopher B.* (1996) 43 Cal.App.4th 551, 558; *In re Kevin S.* (1996) 41 Cal.App.4th 882, 885-886; *In re Joseph E.* (1981) 124 Cal.App.3d 653, 657.) "'It is, of course, "the general rule"' -- to which we find no exception here -- '"that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal."'" (*People v. Alvarez* (1997) 14 Cal.4th 155, 186 [internal citations and quotes omitted].) While the minor's counsel objected to the testimony on hearsay grounds, appellant neither proffered an exception to the hearsay rule nor argued that sustaining the objection impacted her right to confrontation. Consequently, we may not address the issue. (*Ibid.*)

V

After appellant was unsuccessful in moving for substitute counsel, she asked to represent herself.[2] The court attempted to

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[2] The following colloquy occurred:

"THE COURT: Thank you. Yes, Miss B[]?

"[APPELLANT]: I can represent myself if you -- I will represent myself.

"THE COURT: Well, before the Court could have you represent yourself in these proceedings, we have to go over some ground rules before I can determine if that would be an appropriate otherwise or wise or prudent thing to do. [¶] The court will have to find that there is a knowing and intelligent waiver of your right to counsel, and since this particular hearing is probably the most important hearing that there is in a dependency court, I'm really going to need to be satisfied that you are competent to represent yourself.

"[APPELLANT]: I'm very competent of representing myself.

"THE COURT: But the Court is going to have to be satisfied of that fact before I can permit you to do that. [¶] The purpose of today's hearing is to select a permanent plan for Angel. That permanent plan could be based on the recommendation of the Department of Health and Human Services[,] to terminate parental rights for you with the child placed for adoption. That permanent plan could be guardianship with parental rights remaining intact. That permanent plan also could be long-term placement with parental rights --

"[APPELLANT]: Excuse me. Do you think that that is what I want out of this, Your Honor?

"THE COURT: First thing I need to do before I can permit you --

"[APPELLANT]: I understand that.

"THE COURT: -- to represent yourself is determine whether or not you can pay attention to the Court when it's giving directives. Your outbursts do not assist you in that regard.

"[APPELLANT]: Well, I have a right to have an outburst, Your Honor, because --

"THE COURT: No. No. No, you do not.

"[APPELLANT]: Oh, I do not? I have no rights at all, I have no feelings for my child?

"THE COURT: My point is -- that is not what I said. I said you are not to have outbursts. There is no way that I'm going to allow you to represent yourself in these proceedings. You need to be able to ascertain what is going on --

"[APPELLANT]: I have. I have.

[Continued]

explain that it had to find her competent to do so and began to explain the pending hearing but appellant continually interrupted

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"THE COURT: -- and understand that the ramifications of your conduct is important to this particular hearing.

"[APPELLANT]: It should have never got this far. That is why I have a right to an outburst at this particular hearing.

"THE COURT: No, you do not.

"[APPELLANT]: This particular hearing is very important, but it shouldn't have got this far. I deserve a second chance with my daughter. I'm pleading right now.

"THE COURT: The other thing that you need to understand -- Just a second. The other thing that you need to understand is the issue today is not -- the issue today is not whether or not whether or not Angel goes home with you but whether your parental rights are terminated today.

"[APPELLANT]: Well, I -- well -- well-- That is not the issue? If that is not the issue -- well, if that is not the issue, then I can't relate. Then I can't. If that is not the issue because I don't deserve this to happen to me. I don't know one to just step [into] my life and take my child and say it's okay to take her. You don't know me from diddly squat.

"THE COURT: Just a second, ma'am. First thing we need to have perfectly clear -- perfectly clear -- Just a moment.

"[APPELLANT]: I'm very emotional and upset, Your Honor.

"THE COURT: That doesn't mean I'm going to let you continue to make outbursts in this courtroom.

"[APPELLANT]: I apologize, your Honor, but this is the first time that I have ever made an outburst in your courtroom. I have been coming here for two years, Your Honor.

"THE COURT: All right. I understand.

"[APPELLANT]: I apologize[.]

"THE COURT: Thank you. The court will accept your apology. The concern that I have, [counsel for appellant], is not whether or not Parent Advocates of Sacramento should continue to represent the mother or -- I already made a determination in that regard. But I do have serious concern as to whether or not as we sit here today that the mother is fully cognizant of the ramifications of this particular trial, whether or not she is able to competently participate in this particular trial, and that would be the only basis upon which I would have some reservation about going forward today. So we need to get that portion straight. [¶] I certainly cannot make a determination that it would be appropriate for the mother to be representing herself. I don't think that I could take a knowing an [sic] intelligent waiver from her at this time given her current emotional state in these proceedings."

the court and became increasingly upset. Concluding it could not take a waiver of the right to counsel given appellant's current emotional state, the court called a brief recess in the proceedings. When proceedings resumed, the court did not make any further attempt to inquire of appellant and stated: "And the Court is determining that based on [appellant's] previous inability in these proceedings to focus on the questions necessary to an inquiry on the issue of self[-]representation in order to give appropriate responses and also because demonstrated earlier on the record through her prior conduct that it would be a disruption of the court proceedings for her to proceed in pro per, and we would not be able to conduct a meaningful trial, so I'm going to leave Parent Advocates as counsel for the mother."

Appellant contends the court erred in denying her request to represent herself. She relies upon the United States Supreme Court decision in *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] for the proposition that, because she was competent, she had the right to represent herself. Appellant observes that no California case has held *Faretta does not* apply in dependency proceedings and notes the court in *In re Brian R.* (1991) 2 Cal.App.4th 904, at page 921, assumed the *Faretta* rule *did* apply to these proceedings.

In *Faretta,* the Supreme Court held a criminal defendant not only has the right to the assistance of counsel, but also "has a constitutional right to proceed *without* counsel when he

voluntarily and intelligently elects to do so." (*Faretta v. California, supra,* 422 U.S. 806, 807 [45 L.Ed.2d 562, 566] original italics.) The decision in *Faretta* was based on three inter-related arguments: the history of the right of self-representation since the founding of the United States, the structure of the Sixth Amendment, and respect for the individual. (*Martinez v. Court of App. of Cal.* (2000) 528 U.S. 152, 156 [145 L.Ed.2d 597, 603].) In *Martinez*, the Supreme Court applied this reasoning to determine whether there was a right to self-representation on appeal of a criminal case and concluded there was not. (*Id.* at p. 154 [145 L.Ed.2d at pp. 602-603].)

The Sixth Amendment does not apply in dependency proceedings so its structure cannot provide a basis for finding a correlative constitutional right of self-representation. Unlike the bright line rule where the loss of liberty is involved, the constitutional right to counsel in civil cases is evolving. (*In re Andrew S.* (1994) 27 Cal.App.4th 541, 548.) In *Lassiter v. Department of Social Services* (1981) 452 U.S. 18 [68 L.Ed.2d 640], the Supreme Court held due process may require the appointment of counsel in a proceeding to terminate parental rights; the determination is to be made on a case-by-case basis, applying the factors from *Mathews v. Eldridge* (1976) 424 U.S. 319 [47 L.Ed.2d 18].

"The dispositive question, which must now be addressed, is whether the three [*Eldridge*] factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty,

suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate an indigent's parental status. To summarize the above discussion of the [*Eldridge*] factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding, and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

"If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the [*Eldridge*] factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the [*Eldridge*] factors will not always be so distributed, and since 'due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed,' [citation], neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon v. Scarpelli* [(1973) 411 U.S. 778, 36 L.Ed.2d 656], and

leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. [Citation.]" (*Lassiter, supra*, 452 U.S. at pp. 31-32.)

"In post-*Lassiter* dependency cases in California, it appears settled that whether a due process right to counsel existed at the lower court hearing depends on whether the presence of counsel would have made a 'determinative difference' in the outcome of the proceeding. [Citation.]" (*In re Ronald R.* (1995) 37 Cal.App.4th 1186, 1196.) More specifically, the constitutional right to counsel has been held not to attach at a section 366.26 hearing. (*In re Andrew S.* (1994) 27 Cal.App.4th 541, 548-549.) "By the time the 366.26 hearing is held it already has been determined that the parent will not have custody of the child, and the issue to be decided is whether to allow the child to be adopted. Certainly the mother has a stake in that decision, and it is proper that she have counsel at the hearing at which the issue will be decided. But in light of the standards announced by the United States Supreme Court and applied by our Supreme Court, we cannot say the appellant had a constitutional right to appointed counsel at the proceeding. [Citation.]" (*Ibid*.)

Since there is no federal constitutional right to counsel from which a right to self-representation can be derived, we look to the other two bases of the *Faretta* decision. In *Martinez*, the Supreme Court found the historical evidence insufficient to

support a constitutional right to self-representation on appeal in a criminal case. "The historical evidence relied upon by *Faretta* as identifying a right of self-representation is not always useful because it pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime. For one who could not obtain a lawyer, self-representation was the only feasible alternative to asserting no defense at all. Thus, a government's recognition of an indigent defendant's right to represent himself was comparable to bestowing upon the homeless beggar a 'right' to take shelter in the sewers of Paris." (*Martinez, supra*, 528 U.S. at pp. 156-157 [145 L.Ed.2d at pp. 603-604].) The indigent parent facing a loss of parental rights faces no such stark alternatives as he or she has an indisputable statutory right to counsel.

Finally, the *Martinez* court found the respect for individual autonomy as a basis for a right of self-representation must be grounded in the Due Process Clause where the Sixth Amendment did not apply. (*Martinez, supra*, 528 U.S. at p. 160 [145 L.Ed.2d at p. 606].) "Under the practices that prevail in the Nation today, however, we are entirely unpersuaded that the risk of either disloyalty or suspicion of disloyalty is a sufficient concern to conclude that a constitutional right of self-representation is a necessary component of a fair appellate proceeding." (*Ibid*.) This same reasoning applies to defeat a constitutional right to self-representation in a dependency proceeding.

Nor can a constitutional right to self-representation be grounded on the California Constitution. In *People v. Sharp*

(1972) 7 Cal.3d 448, at pages 457-459, our Supreme Court held there was no right to self-representation under the state constitution.

That there is no constitutional right of self-representation in a dependency proceeding does not necessarily mean there is no such right. In *In re Justin L.* (1987) 188 Cal.App.3d 1068, this court concluded there is a statutory right to self-representation in a proceeding to terminate parental rights, and error in denying this right should be analyzed under ordinary principles of harmless error as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 837. As we explain, we adhere to that holding.

In *Justin L.*, an attorney had been appointed to represent the mother in a proceeding to terminate her parental rights under former Civil Code section 232. (*In re Justin L., supra*, 188 Cal.App.3d at p. 1071.) At the start of trial, the mother filed a document entitled "Discharge of Attorney and Substitution of Party in Propria Persona." The court denied the request to discharge counsel, telling the mother she was "stuck with him." (*Id*. at p. 1072, and fn. 1.) We found no constitutional right to waive counsel, but that such right had been granted by statute. At that time Civil Code section 273.5, subdivision (b) provided for the appointment of counsel "*unless such representation is knowingly and intelligently waived*." (*In re Justin L., supra*, at p. 1073, fn.2 [original italics].) We found the error in depriving the mother of her statutory right to waive counsel was subject to the ordinary principles of harmless error and was harmless. (*Id*. at pp. 1077-1078.)

The current provisions for the appointment of counsel in dependency cases (codified in the Welf. & Inst. Code) are are similar to those considered in *Justin L., supra,* 188 Cal.App.3d 1068. Section 317 provides, in part: "(a) When it appears to the court that a parent . . . of the child desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this section. [¶] (b) When it appears to the court that a parent . . . of the child is presently financially unable to afford and cannot for that reason employ counsel, and the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care, the court shall appoint counsel, unless the court finds that the parent . . . has made a knowing and intelligent waiver of counsel as provided in this section. [¶] . . . [¶] (d) The counsel appointed by the court shall represent the parent, guardian, or child at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent or child unless relieved by the court upon the substitution of other counsel or for cause. The representation shall include representing the parent or the child in termination proceedings and in those proceedings relating to the institution or setting aside of a legal guardianship." (See also Cal. Rules of Court, rule 1412(h)(1).)

Section 317, subdivision (b) gives the parent the right to waive counsel in the circumstance where appointment of counsel is mandatory. Indeed, the court is not "obliged to appoint counsel"

absent "some manifestation by the indigent parent that he or she wants representation." (*In re Ebony W.* (1996) 47 Cal.App.4th 1643, 1647.) This limitation on the court's duty to appoint counsel is implicit recognition that the primary right of the parent is self-representation.[3]

We do not read subdivision (d), which assures vertical representation throughout the dependency proceedings, to defeat the parent's right to waive counsel. A parent may waive counsel at any point. (See, e.g., *In re Jamie R.* (2001) 90 Cal.App.4th 766, 771-772 [mother waived right to counsel at in camera hearing where she remained silent after counsels' stipulation to permit court to interview children without counsel present].) Section 317 has been construed to permit relieving counsel from appointment once the parents no longer desire counsel. (*Janet O. v. Superior Court* (1996) 42 Cal.App.4th 1058, 1064.) "To construe the section's language as prohibiting the court from relieving counsel where, as here, the evidence indicates the parents no longer desire representation, would scuttle the purpose of the statute which is to provide counsel only to those parents who desire representation and are financially unable to afford counsel." (*Ibid*.)

When the child has been removed from the home and appointment of counsel is mandatory for an indigent parent absent

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[3] Unlike the state statutes, the federal statutes explicitly provide for the right of self-representation. (28 U.S.C. § 1654.)

a knowing and intelligent waiver, more is required than simply accepting that the parent no longer desires counsel and ascertaining the parent is not using the request to proceed pro se to intentionally obstruct the proceedings. Certainly, to comply with section 317, subdivision (b), the court must take a waiver of the right to counsel. There is no requirement, however, that the court engage in a full *Faretta*-type admonition and inquiry, although similar admonitions have occurred in civil cases. (See *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 637.) Further, the court must respect the right of the parent to represent him or her self as a matter of individual autonomy and avoid forcing the mentally competent parent to proceed with appointed counsel in the guise of protecting a person who is unskilled in the law and courtroom procedure. (See *Faretta v. California, supra,* 422 U.S. at p. 834 [45 L.Ed.2d at p. 581]; *Godinez v. Moran* (1993) 509 U.S. 389, 399-400 [125 L.Ed.2d 321, 332-333].) The right to counsel should not be used to "'imprison a man in his privileges.'" (*Martinez v. Court of App. of Cal., supra*, 528 U.S. at p. 165 (conc. opn. of Scalia, J.).)

Here, the court attempted to take a waiver of appellant's right to counsel, but appellant was too upset initially to respond appropriately. Nothing in the exchange between the court and appellant, however, indicated she lacked basic competency either to give a waiver of counsel or to represent herself. On returning from the recess, when it appeared that appellant had regained some composure, the court should have made a second attempt to take a waiver of her right to counsel. Instead, the

court's comments suggest the court did not recognize appellant had the right to proceed pro se and was instead basing its decision on concerns she might disrupt the courtroom proceedings. The concern is a valid one and litigants do not have the right to intentionally disrupt or delay the proceedings. (See *Faretta v. California, supra,* 422 U.S. at p. 834, fn. 46 [45 L.Ed.2d at p. 581].) The possibility of disruption or delay, however, exists to some degree with virtually all pro se litigants and the mere possibility alone is not a sufficient ground to deny self-representation. Only when the pro se litigant "is and will remain" so disruptive as to significantly delay the proceedings or render them meaningless and negatively impact the rights of the minor in a prompt and fair hearing may the court exercise its discretion to deny self-representation. (See *People v. Welch* (1999) 20 Cal.4th 701, 735.)

The record in this case does not support a conclusion that appellant's conduct had reached this disruptive level. By her own unrefuted statement, she had been coming to court for two years and had never engaged in an outburst before. While her initial exchange with the court was emotional and somewhat uncontrolled, she did recognize her conduct was inappropriate and apologized to the court. There is no indication that upon resuming the proceedings appellant was anything but respectful and cooperative. Accordingly, on this record we cannot conclude the court properly denied appellant the right to represent herself.

Since the right of self-representation in a dependency proceeding is statutory rather than constitutional, denial of the right is analyzed under the ordinary principles of harmless error. (*People v. Sharp, supra*, 7 Cal.3d at pp. 461-463; *In re Justin L., supra*, 188 Cal.App.3d at p. 1077.) On a review of the entire record, it does not appear reasonably probable that a result more favorable to appellant would have been reached had she represented herself. (*People v. Watson, supra,* 46 Cal.2d 818, 837.) Appellant was able to present her case to the court through her testimony. It is not reasonably probable that by representing herself appellant would be able to counter the evidence that the minor had not formed a substantial emotional bond or attachment with her or that adoption was in the minor's best interest.

DISPOSITION

The judgment is affirmed. (*CERTIFIED FOR PARTIAL PUBLICATION.*)

MORRISON, J.

We concur:

SCOTLAND, P.J.

HULL, J.